Somekh v. Huntington Beach Union High School District , Case No. 15-1643 JVS (DFMx)

Tentative Minute Order re Motions *in Limine*[1]

Plaintiffs Alfred Somekh *et al.* (collectively "Somekh") move the Court for relief by way of Motions *in Limine.* The Court now enters its rulings.

I. Motion *in Limine* No. 1: Expert Michael Olsen

Somekh seeks an order to exclude the testimony of Michael Olsen, an expert designated by Huntington Beach Union High School District ("School District".) (Docket No. 57.) The School District has filed an opposition. (Docket No. 71.) Somekh has not replied.

A. Legal Standard.

Federal Rule of Evidence 702 permits expert testimony from "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

(Fed. R. Evid. 702.)

On this challenge, the Court is called to exercise its "gatekeeper" function to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals,

[1]Somekh originally filed five motions *in limine.* (Docket Nos. 40-44, 46.) The Court ordered the motions off calendar for failure to comply with Local Rule 7-3. (Docket No. 45.) Only *in limine* motions 1, 2, 4, and 5 were refiled.

Inc., 509 U.S. 579, 597 (1993). A trial court's "gatekeeping" obligation to admit only expert testimony that is both reliable and relevant is especially important "considering the aura of authority experts often exude." Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063-64 (9th Cir. 2002). Nevertheless, "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010). Importantly, the Court's gatekeeper role under Daubert is "not intended to supplant the adversary system or the role of the [trier of fact]." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (internal quotation marks and citation omitted). In other words, at this stage, the Court is not supposed "to make ultimate conclusions as to the persuasiveness of the proffered evidence." (Id.)

The requirement that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance. Primiano, 598 F.3d at 564.

The Rule 702(c) and (d) reliability indicators are subject to a more flexible analysis. According to the Ninth Circuit,

> [i]n Daubert, the Supreme Court gave a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002).

The trial court has "broad latitude" in deciding how to determine the reliability of an expert's testimony and whether the testimony is in fact reliable. Mukhtar, 299 F.3d at 1064; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The "test of reliability is 'flexible,' and Daubert's list of specific

factors neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire, 526 U.S. at 141.

B. Discussion.

Olson was designated as a non-retained expert regarding the School District's 2015 psycho evaluation of W.S. ("Student"). (Motion, Ex. 1, pp. 1-2.)

The sole basis for Somekh's challenge is that Olson is not qualified to testify as an expert. (Id., pp. 4-5.) He did not conduct an educationally related mental health services ("ERMHS") evaluation; he did not consider the medications that the Student was taking as part of the Psychol-Educational Evaluation; he did not provide psycho therapy to the Student during counseling sessions. (Id.)

First, Olson is a well-credentialed and experienced child psychologist. (Opposition, Ex. B.) He holds a bachelor's degree in psychology and social behavior, and an education specialist degree/master of arts in educational psychology. (Id., p. 1.) He has substantial practical experience. (Id., pp. 1-4.)

Second, Olson's testimony will be helpful to the jury given that a key issue is the School District's psychological assessment of the Student, a process in which he participated. (Fed. R. Evid. 702(a).) Just as is true for other expert witnesses discussed below, the subject matter of special education and psychological testimony is well beyond the experience of the average juror.

Third, at most, Somekh's criticism go to the weight of Olson's opinion's. Whether Olson conducted certain tests can be addressed on cross-examination. Moreover, Somekh offers no evidence that Olson failed to consider medications which the Student was taking. In any event, these are all matters for cross examination.

As the School District notes, Olson was allowed to testify concerning the School District's assessment of the Student at the underling OEH hearing. (Opposition, p. 5.) This further validates his qualifications to testify.

His testimony is relevant (Fed. R. Evid. 402), and Somekh offers no basis for exclusion under Rule 403 (Fed. R. Evid. 403).

The Motion is denied.

II. Motion *in Limine* No. 3: Exclusionary Sanctions.

Somekh seeks certain exclusionary sanctions based on the School District's failure to respond to certain written discovery. (Docket No. 46.) The School District has filed and opposition (Docket No. 74), and Somekh has replied (Docket No. 81).

The focus of the motion is 7 interrogatories in Somekh's First Set of Interrogatories which the Court discussed below. There is an important overlay to the dispute. Somekh claims he did not move for relief in the usual manner through a motion to compel because the School District agreed to serve supplemental responses. (Motion, p. 11.) There is no question that the School District made those representations. (Motion, Ex. 3.) The School District explains its failure to supply supplemental responses because of the lengthy and repeated representation that the case was settled, which only evaporated shortly before the fact discovery deadline. (Opposition, pp. 2-4, 6.) There is no question that Somekh agreed to settle, vacillated, and then finally withdrew. Thus, there is merit in both parties' positions.

In most instances, the School District responded with objections and then an offer to make documents available under Federal Rule of Civil Procedure 33. In most instances, the School District also objected on attorney-client and work product grounds. (E.g.. Motion, Ex. A, Interrogatory No. 2, p. 3.) It is not clear that all responsive information falls within the privileges. Moreover, the objections that the questions were vague and ambiguous are simply frivolous.

Rule 33 provides:

> If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the

same for either party, the responding party may answer by:

> (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
>
> (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

(Fed. R. Civ. P. 33(d).) Directing Somekh to the 294 exhibits and the transcripts in the OHA Case does not fairly meet the requirements of the Rule. In essence, the School District puts Somekh to the burden of going through a mass administrative record to answer very specific questions. Such a response is not sufficient.

The Court takes a closer look at each interrogatory.

Interrogatory No. 5 seeks information concerning the School District's contention concerning Somekh's fee request. (Motion, Ex. 1, pp. 4-5.) The School District's response points to its Amended Summary Judgment Opposition. But it also indicates that it has additional information. The School District did not agree to supplement its response in its correspondence, but it is clear that it has information which should be disclosed.

Interrogatory Nos. 2 and 3 seek information concerning the Student's sports activities, and Interrogatory No. 4 seeks information concerning the School District's information requests from the Student's doctors. (Motion, Ex. 1, pp. 3-4.) The School District promised to supplement these interrogatories. (Motion, Ex. 3, p. 1.) It has not done so.

Interrogatory Nos. 12, 13 and 15 relate to the School District's affirmative defenses. (Motion, Ex. 3, p. 2.) The School District promised to supplement these interrogatories. (Motion, Ex. 3, pp. 2-3.) It has not done so.

Somekh's failure to file a motion to compel is excusable in light of the way events played out, including the apparent likelihood of settlement.

Likewise, the School District's failure to supplement is justified. (Fed. R. 37(c).) However, the analysis does not stop here because the information which Somekh seeks is still relevant and important.

The Court has substantial discretion to craft remedies under Rule 37(c). Fed. R. Civ. P. 37(c)(1); Yetti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). The Court orders the following:

> • The parties shall meet and confer within seven days and shall agree on a timetable for providing supplemental responses. The Court intends to bifurcate the claim for attorney's fees, and the timetable for Interrogatory No. 5 may be separate and later.
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> • The Court will conduct a hearing on August 14, 2017 at 10:30 a.m. to hear the parties' views on what discovery will be necessary in the light of the supplemental responses and how long it will take. The Court will set a date for completion.
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> • The Court vacates the trial date, but will promptly reset the case once it has the parties' views on the timetable for discovery.

The Court awards no monetary sanctions. All relief except as indicated above is denied.

III. Motion *in Limine* No. 4: JoAnn Tognoni.

Somekh seeks an order to exclude the testimony of the School District's expert JoAnn Tognoni ("Tognoni"). (Docket No. 58.) The School District has filed and opposition (Docket No. 72), and Somekh has replied (Docket No. 80).

Tognoni was designated by the School District as a non-retained expert to testify concerning the School District's 2015 psychological evaluation of the Student. (Docket No. 57, Ex. 1, p. 2.)

Somekh contends that Dorsey is not qualified to render expert opinions, and that her testimony is not relevant. (Motion, pp. 3-6.)

First, Tognoni is a credentialed special education teach with extensive experience. She is qualified to express opinions concerning the testing she did, and her participation in the 2015 evaluation. It does not follow that because a qualified psychological expert may be required as part of an IDEA placement that Tognoni does not have the credentials to testify in a more limited area that is nevertheless part of the evaluation process. (See Reply, p. 3, citing Cal. Education Code § 56320(b)(3).)

Second, her testimony about the special education process and the proceedings in this case will be helpful to the jury. (Fed. R. Evid. 702(a).) Her participation in the case goes beyond the administering of a single test.

Her testimony is directly relevant, and Somekh offers no basis to excluded the testimony under Rule 403 (Fed. R. Evid. 403).

The Motion is denied.

IV. Motion *in Limine* No. 5: Erin Dorsey

Somekh seeks an order to exclude the testimony of the School District's expert Erin Dorsey ("Dorsey"). (Docket No. 59.) The School District has filed an opposition (Docket No. 73), and Somekh has replied (Docket No. 80).

Dorsey was designated by the School District as a non-retained expert to testify concerning the School District's 2015 psychological evaluation of the Student. (Docket No. 57, Ex. 1, p. 2.) Somekh contends that Dorsey is not qualified to render expert opinions, and that her testimony is not relevant. (Motion, pp. 3-5.)

First, as a trained registered nurse with experience in working with children with physical and emotion problems, she has sufficient qualifications to testify as an expert. That she might have had other or further credentials is a matter for cross examination.

Second, her testimony will be helpful to the jury because she actually participated in the 2015 evaluation. (Fed. R. Evid. 702(a).)

Third, Somekh offers no challenge to the testing done by Olson, the validity of her data, or the reliability of her results.

There is no indication in the School District's disclosure that she will render opinion formed outside the scope of her participation in the 2015 assessment. In the absence of prior disclosure, the Court would exclude such opinions. (See Reply, p. 2; Fed. R. Civ. P. 37(c).)

The challenge to the relevance of Dorsey's testimony is without merit.

The Motion is denied.

V. Further Thought.

Although the Court has indicated that each of the School District's experts will be allowed to testify, the question of the reasonableness the School District's conduct under the Rehabilitation Act and the Americans with Disabilities Act will be a question for the jury.

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Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.